VIRGINIA LAW REGISTER

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When this number of the REGISTER reaches its readers the Code of 1919 will have been in effect a little over two weeks. How much of it will be amended by that time only the Legislature and the Higher Powers know at this time of writing. We sincerely hope that the General Assembly will not at its present session make any amendments. Let us give the Code a working chance for a couple of years. No great damage can be done in that time and some of the supposed evils will perchance be shown to be benefits, on trial.

The Code of 1919.

An examination of the work in its completed form seems to evince a decided improvement in this body of the Statute Law. That it will hit, and "hit hard" some men's ideas as to what the law ought to be, we do not doubt. But all men do not agree as to what the law ought to be, and if every Legislator's ideas as to the law were carried into effect, the law would cease to be worth consideration. That some amendments will be needed we are willing to admit, but let us not haste to amend, before we find out the actual need of amendment.

The annotated edition, in two volumes, costs $15.00 and should be ordered directly from the Secretary of the Commonwealth.

The Editor-in-Chief had the pleasure, on Tuesday, the 13th day of January, of attending the regular meeting of the Bar Association of the city of New York, in their palatial quarters in the building running through from 44th to 43rd Street. Over three hundred lawyers were present and we were very much struck, not only

The New York State Bar Association.

with the personnel of the body, but with the force of the reports made by the various committees. The Committee on Legal Education made a lengthy and elaborate report, urging five years study of the law before one should be allowed to practice. Adding this to the collegiate education required, it would be very hard to see how a man could get to the practice of the law under twenty-five or thirty years of age, and we must confess we were neither carried away by the reasoning of the learned gentleman who submitted the report, or by any facts which he quoted to sustain it.

The chief interest, however, of the meeting was in the debate on the resolutions introduced by Judge Charles E. Hughes, condemning the action of the New York General Assembly in suspending the five socialist members pending investigation. Judge Hughes' argument did not impress us as either based upon right reason or law. Judge Guthrie's reply it seemed to us was a complete answer, and the venerable Judge Ingram entered an earnest protest against the Bar Association's entering into anything which savored of politics. His motion to lay Judge Hughes' resolution upon the table would probably have been carried, but there was so much remonstrance against shutting off debate that he withdrew it and argument pro and con extended until a good while after midnight. Judge Hughes' motion was carried and a committee appointed to represent the Bar Association before the General Assembly. In our judgment this was a most unfortunate move on the part of the Association, but of course we are not entitled to express any opinion that amounts to anything, and yet the matter is one of so much general interest to the whole country that we hope to give more extended discussion to it in the next issue of the REGISTER.

The meeting of this Association is strictly for business. There is no social feature whatever about it.

We must confess our soul was filled with envy when we contemplated the luxurious quarters of the Association: An immense library which has cost up to this time nearly four hundred thousand dollars; superb lounging rooms, writing rooms, and quick service in aid of one preparing a brief. We were

treated with the greatest consideration and courtesy by our New York brethren and deem it a great privilege that we were allowed to attend the meeting.

Judge Edward W. Saunders.

The election by the Legislature of Hon. Edward Watts Saunders of Rocky Mount, to succeed Judge Stafford G. Whittle, retired, upon the Supreme Court of Appeals, meets with universal approval.

Judge Saunders has ably served his native State for more than a quarter of a century. He is a lawyer of the highest ability, is gifted with an excellent judicial temperament, and made a fine record while on the circuit bench. He is eminently qualified to fulfill the duties of the new position with which he has been honored, and we predict that he will take rank with the other great judges who have been members of Virginia's highest court.

Judge Saunders was born in Franklin County, Va., October 25, 1860. He was educated at home, at the Bellevue High School, of Bedford County, and at the University of Virginia. From the latter institution he received the degree of bachelor of law in June, 1882, and in the summer of that year opened a law office in Rocky Mount, where he continuously practiced his profession until elected circuit judge. In 1887 he was elected to the House of Delegates, and re-elected successively for seven terms. He served as chairman of several important committees in that body and in 1899 was elected Speaker, which position he retained until elected judge of the Fourth Circuit in 1901. Under the operation of the new constitution, he became judge of the Seventh Circuit, and while serving in that position, was elected to fill the vacancy in the Fifty-Ninth Congress, caused by the resignation of Hon. Claude A. Swanson, representative from the Fifth District. He was elected to each succeeding Congress and soon became known as one of the best parliamentarians in that body, over which he was often asked to preside during the absence of the Speaker.

It is with confidence that the members of the profession

await the results of his labors as a member of our highest court. B. S.

A New Departure on the Part of Our Court of Appeals.

Our Supreme Court of Appeals, by the time this number reaches our readers, will have appeared in the dignity of the judicial gown. This news will prove a source of great satisfaction to all members of the profession who believe in the dignity of the courts. The Bar Association has long since passed a resolution requesting the court to gown itself, and we do not believe there is a single man in the Commonwealth who will not approve of this action on the part of the court. The great trouble with our Virginia courts is the free and easy manner in which business is conducted. Our judges are too prone to be lenient and amiable and to forget that upon the Bench they represent the dignity of the law and sit, so to speak, as if on the judgment seat of God. Nothing so lowers the people's opinion of the law as lack of dignity on the part of our courts. We only wish that the circuit and corporation judges would follow the good example set by the Supreme Court of Appeals. There is no question about it that the gown adds dignity to the official who wears it and reminds him and the practitioners and people, that on the Bench he is no longer a private individual, but should be treated with the greatest respect and consideration by Bar and people alike.

Due Process of Law—Eminent Domain—Notice and Hearing.

The Supreme Court of the United States sustains our Supreme Court of Appeals in the case of *Bragg* v. *Weaver,* decided December 8th, 1919.

The question involved was the constitutionality of § 944a, clauses 21 and 22, Pollard's Code 1904.

Under this section the superintendent of roads or deputy is authorized to take earth, etc.,

from the land of any adjoining owner to be used in repairing a public road.

The taking is to be from the most convenient and nearest place where it will be attended with least expense.

Provision is made for any tenant or owner of land who thinks himself injured and who cannot agree with the superintendent or deputy, to apply to a justice who summons three freeholders to assess the damages and report to the Board of Supervisors, who allow the full amount, or so much thereof, as upon investigation they find reasonable, subject to the owner's or tenant's right of appeal to the Circuit Court, as in other cases.

There has been and was until the decision in the instant case, some doubt amongst the profession as to the constitutionality of the Act, because the taking preceded the award of damages and was without notice to the owner or tenant until after the damage was done—of course the decision of our Supreme Court settled this question as far as our own State Courts were concerned. The Supreme Court of the United States, Mr. Justice Van DeVanter delivering the unanimous opinion of the Court, holds the section to be clearly constitutional and in no way in conflict with the "due process clause" of the United States Constitution.

The Court says:

> "It is conceded that the taking is under the direction of public officers and is for a public use; also that adequate provision is made for the payment of such compensation as may be awarded. Hence no discussion of these matters is required. The objection urged against the statute is that it makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid.
>
> Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment. Mississippi & R. River Boom Co. *v.* Patterson, 98 U. S. 403, 406, 25 L. ed. 206, 207; A. Backus, Jr., & Sons *v.* Fort Street

Union Depot Co., 169 U. S. 557, 568, 42 L. ed. 853, 858, 18 Sup. Ct. Rep. 445; Adirondack R. Co. *v.* New York, 176 U. S. 335, 349, 44 L. ed. 492, 499, 20 Sup. Ct. Rep. 460; Sears *v.* Akron, 246 U. S. 242, 251, 62 L. ed. 688, 698, 38 Sup. Ct. Rep. 245.

But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court, carrying with it a right to have the matter determined upon a full trial. United States *v.* Jones, 109 U. S. 513, 519, 27 L. ed. 1015, 1017, 3 Sup. Ct. Rep. 346; A. Backus, Jr., & Sons *v.* Fort Street Union Depot Co., 169 U. S. 569, 42 L. ed. 859, 18 Sup. Ct. Rep. 445. And where this mode is adopted, due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal."

The case was one of first impression in our Supreme Court and the United States Court in its opinion takes note of this:

"Apart from what is implied by the decision under review, no construction of these statutory provisions by the state court of last resort has been brought to our attention; so, for the purposes of this case, we must construe them. The task is not difficult. The words employed are direct and free from ambiguity, and the several provisions are in entire harmony. They show that, in the absence of an agreement, the compensation is to be assessed primarily by viewers; that their award is to be examined by the supervisors and approved or changed as to the latter may appear reasonable; and that, from the decision of the supervisors, an appeal lies as of right to the circuit court, where the matter may be heard de novo. Thus, by exercising the right to appeal, the owner may obtain a full hearing in a court of justice,—one concededly possessing and exercising a general jurisdiction. An opportunity to have such a hearing, before the compensation is finally determined, and when the right thereto can be effectively asserted and protected, satisfies the demand of due process.

Under the statute, the proceedings looking to an assessment may be initiated by the owner as well as by the road officers. Either may apply to a justice for the appointment of viewers. Thus the owner is free to act promptly and upon his own motion, if he chooses.

But it is contended that where the road officers take the

initiative,—as they do in many instances,—the proceedings may be carried from inception to conclusion without any notice to the owner, and therefore without his having an opportunity to take an appeal. We think the contention is not tenable. It takes into account some of the statutory provisions and rejects others equally important. It is true there is no express provision for notice at the inception or during the early stages of the proceedings; and for present purposes it may be assumed that such a requirement is not even implied, although a different view might be admissible. See Paulsen *v.* Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750. But the provisions relating to the later stage—the decision by the supervisors—are not silent in respect of notice, but speak in terms easily understood. Clauses 5 and 22, taken together, provide that the owner, if dissatisfied with the decision, shall have the right to appeal as in other cases. This presupposes that he will have some knowledge of the decision; and yet neither clause states how the knowledge is to be obtained, or when or how the right of appeal is to be exercised. All this is explained, however, when § 838 is examined. It deals with these questions in a comprehensive way and evidently is intended to be of general application. Of course, newly created rights of appeal of the same class fall within its operation unless the legislature provides otherwise. Here the legislature has not provided otherwise, and so has indicated that it is content to have the general statute applied. As before stated, that statute provides that the claimant, if not present when the supervisors' decision is made, shall be notified thereof in writing, and shall have thirty days after such notice within which to appeal. If he be present when the decision is made, he is regarded as receiving notice at that time, and the thirty days for taking an appeal begin to run at once. It is apparent, therefore, that special care is taken to afford him ample opportunity to appeal, and thereby to obtain a full hearing in the circuit court."

The court disposes of the only question as to which any doubt had been entertained by lawyers in Virginia as follows:

"The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay, the taking does not contravene due process of law in the sense of the 14th Amendment merely be-

cause it precedes the ascertainment of what compensation is just. Sweet *v.* Rechel, 159 U. S. 380, 402, 407, 40 L. ed. 188, 197 198, 16 Sup. Ct. Rep. 43; A. Backus, Jr., & Sons *v.* Fort Street Union Depot Co., 169 U. S. 557, 568, 42 L. ed. 853 858, 18 Sup. Ct. Rep. 445; Williams *v.* Parker, 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440; Crozier *v.* Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 306, 56 L. ed. 771, 776, 32 Sup. Ct. Rep. 488. And see Branson *v.* Gee, 25 Or. 462, 24 L. R. A. 355, 36 Pac. 527. As before indicated, it is not questioned that such adequate provision for payment is made in this instance.

We conclude that the objections urged against the validity of the statute are not well taken.

Judgment affirmed."

"Due Process."

We do not believe any question has been more under discussion before the Supreme Court of the United States than the "due process" clause in the 14th Amendment to the United States Constitution.

In the Advance Sheets of January 1st, published by the Lawyer's Co-op. Pub. Co. of Albany, fourteen cases are reported: Three turn upon the "due process" clause—i. e., the case just above commented upon: A case involving the right of a municipality to clear a space for the construction of its own street lighting system by removing or relocating the instrumentalities of a privately owned lighting system occupying the public streets under a franchise legally granted without compensating the owner of such system for the rights appropriated. The Supreme Court held that this could not be done, J. J. Pitney and Clark, dissenting.

It was contended that the "police power" gave the city the right to do as they did without compensating the company, but the court held that what the city did was not done in its governmental capacity—an exertion of the police power—but in its "proprietary or quasi private capacity" and therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field.

The court says:

"It is not necessary to repeat the reasoning or the examples of the cases cited above, by which and in which the different capacities of the city are defined and illustrated. A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are attended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper process of law,—the payment of compensation.

The franchise of the present controversy was granted prior to 1911, and hence has the attrisutes and rights described in Russell *v.* Sebastian, 233 U. S. 195, 58 L. ed. 912, L. R. A. 1918E, 882, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282. Its source, as was that of the franchise in that case, is the Constitution of the state, and is that 'of using the public streets and thoroughfares thereof * * * for introducing into and supplying' a city 'and its inhabitants either with gaslight or other illuminating light.' We said of such that the 'breadth of the offer was commensurate with the requirements of the undertaking which was invited. The service to which the provision referred was a community service. It was the supply of a municipality —which had no municipal works—with water or light.' And again: 'The individual or corporation undertaking to supply the city with water or light was put in the same position as though such individual or corporation had received a special grant of the described street rights in the city which was to be served.' We can add nothing to this definition of rights, and, we may repeat, they did not become immediately violable or become subsequently violable.

It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the 14th Amendment forbids. What the grant was at its inception it remained, and was not subject to be displaced by some other system, even that of the city, without compensation to the corporation for the rights appropriated."

We can hardly see any reason for any dissent to the principles as laid down in the opinion—J. J. Clark and Pitney hand down no dissenting opinion, so we cannot have the benefit of their doubts in the case.

We have more than once insisted in the editorial columns of the REGISTER, that a city when it "went into business" such as supplying gas, water or light to its inhabitants, should not be allowed to claim any more rights than a person engaged in a similar business. We are glad to see the Supreme Court takes practically the same view.

The third case is one of great novelty and interest. The Oklahoma Constitution (commend us to Oklahoma when any novelty in the law is desired), provides that "the defense of contributory negligence or of assumption of risk shall in all cases whatsoever, be a question of fact and shall at all times be left to the jury."

A man named Roberts deliberately stepped upon a railroad track when a train was approaching, in full view, with the usual result. His administratrix brought suit. The State Court assumed that if the question were open for a ruling of law, it would be ruled that there could be no recovery. But the question had to be left to the jury who gave a verdict for the fair plaintiff (we presume she was fair) for the full amount claimed. The Supreme Court of Oklahoma affirmed the judgment and so does the Supreme Court of the United States in the case of C. R. I. & P. Rwy. Co. *v.* Roberts' Adm'x.

There is nothing in the Constitution of the United States or its amendments that requires a state to maintain the line with which we are familiar between the functions of the jury and those of the court.

> "It may do away with the jury altogether (Walker *v.* Sauvinet, 92 U. S. 90), the requirements of a verdict (Minneapolis & St. L. R. Co. *v.* Bombolis, 241 U. S. 211, 60 L. ed. 961, L. R. A. 1917A, 86, 36 Sup. Ct. Rep. 595, Ann. Cas. 1916E, 505), or the procedure before it (Twining *v.* New Jersey, 211 U. S. 78, 111, 53 L. ed. 97, 111, 29 Sup. Ct. Rep. 14: Frank *v.* Mangum, 237 U. S. 309, 340, 59 L. ed. 969, 985, 35 Sup. Ct. Rep. 582). As it may confer legislative and judicial powers upon a commission not known to

the common law (Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67), it may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the states, and the controversy with regard to their powers in matters of law more generally as illustrated in Sparf *v.* United States, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168, and Georgia *v.* Brailsford, 3 Dall. 1, 4, 1 L. ed. 483, 484, shows that the notion is not a novelty. In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished, when the ground might have been altogether removed."

It may surprise some of the younger members of the profession to know that until Muscoe's case, 86 Va., p. 443, it was an open question as to whether juries in Virginia were not in criminal cases judges of the Law as well as of the Facts.

CORRECTION.

We regret very much that there was an error in the printing of the sketch of Isaac Bonaparte Bell on page 677 of the January number. The 9th line from the bottom of the page is a repetition of the opening line of the preceding paragraph. This whole line should have been omitted and in the place thereof the following should have appeared: "He marshalled his facts with remarkable ability, applied the". Inasmuch as a reader would have difficulty in making any sense whatever of the sentence as it now stands, we make the above correction so that all interested parties can amend the text so that it will read sensibly.